D.B. CIVIL SPECIAL APPEAL NO.84/2007

Union of India Vs. M/s Sood Enterprises & Ors.

Date : 23.7.2007

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE MAHESH CHANDRA SHARMA

Mr. Kuldeep Mathur for the appellant.

Heard learned counsel for the appellant.

The appeal is directed against the order of learned Single Judge dated 18.4.2006 dismissing the appellant's restoration application in D.B. Civil Misc. Appeal No.1140/2004 arising out of arbitration award against the Union of India.

The aforesaid misc. Appeal was dismissed on 6.12.2004 for non-appearance of the counsel. The restoration application filed by the appellant was dismissed on 18.4.2006.

Mr. T.R. Bishnoi appearing for the appellant

before learned Single Judge stated that during the period the non-appearance of counsel was recorded in the proceedings in the misc. Appeal, his father was seriously sick and he was attending to him for which reason he could not come to the Court. His father ultimately died on 25th February, 2005 and he could attend to his office only after performing customs in accordance with the Hindu Rites. It is only when the officer in charge came for inquiring about the case on 12.3.2005 the counsel came to know on enquiry from the Registry that his appeal has been dismissed on 16.12.2004 and thereafter the application was moved on 8th April, 2005 as noticed by us above.

During serious sickness and subsequent demise of the father of the counsel provide a sufficient cause for non-appearance of the counsel on the date on which the his absence has been recorded. In the aforesaid circumstances, it also cannot be said that the counsel had acted with any gross negligence nor the conduct of the litigant can be said to be grossly negligent so as to deny him hearing on merit.

The application for restoration has been rejected on the ground that the application of restoration is barred by time and no case has been made out which could have prevented the appellant from filing the application within limitation.

The perusal of the judgment goes to show that primarily the judgment proceeds on finding the explanation on each days delay.

It is now well settled that the applicant does not have to justify each day's delay and secondly he has only to justify that he was prevented by sufficient cause from filing the application within limitation, if he has otherwise acted diligently.

The facts which are un-controverted were that the appeal under Section 37 of the Arbitration Act was dismissed for want of prosecution due to non-appearance of the counsel on 16.12.2004. The limitation for presenting the application for restoring the

appeal was considered to be under Article 122 of the Limitation Act, 1963 to be 30 days from the date of dismissal that is to say the period for limitation for filing application expired on 15th of January 2005. The illness of counsel's father due to which he expired on 25.1.2005 is not a fact in controversy. Apparently, the serious sickness of parent upon whom the counsel was attending is a sufficient cause which had prevented him in the court and thereafter filing of application within limitation.

Once the limitation has expired within which the appellant was prevented by sufficient cause from filing the same. The second question that requires to be considered is whethere it can be said that in the aforesaid facts and circumstances, the counsel has acted with gross negligence or the litigant has acted with gross negligence.

In the circumstances noticed above, we are of the opinion that the application ought to have been allowed by condoning the delay in filing the application.

The application for restoring the appeal ought to have been allowed and the appeal ought to have been heard on merit.

Since notices of appeal also have not been issued and no one had appeared in appeal, at that stage the notices to the respondents is not required to be issued for the purpose of restoring the appeal to its original number.

Accordingly, this appeal is allowed. The order under appeal is set aside. As a result of the aforesaid discussion the application under Section 5, Limitation Act is allowed. The delay in filing the application is condoned. S.B. Civil Restoration Application No.1161/2005 be regularly registered. For the reasons stated above, the application for restoration of S.B. Civil Misc. Appeal No.1140/2004 is allowed. The S.B. Civil Appeal No.1140/2004 – Union of India Vs. M/s Sood Enterprises is restored to its original number to be proceeded further.

[MAHESH CHANDRA SHARMA], J. [RAJESH BALIA], J.

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